INDEX.

	Page.
Statement	2
Question involved	4
Statutory provisions	5
Importance of question	6
Examples of the misapplication of the Yuginovich decision by District and Circuit Courts	11
The effect of a repeal of internal revenue laws as to intoxicating liquor for beverage purposes is to discriminate in favor of the greater law violator	17
A repeal of the smuggling statutes in so far as they may apply to beverage liquors presents a still more flagrant discrimination	19
There is no inconsistency in taxing a prohibited traffic	21
Repeal of internal revenue statutes as to one kind of liquor and not another is an unworkable division of the law	25
Congress indicated intention to retain existing liquor laws	28
The Yuginovich decision is not controlling in instant case	30
Sections of Revised Statutes separately considered	33
Conclusion	39
Appendix	41
Section 3242, Revised Statutes	41
Section 3258, Revised Statutes	41
Section 3281, Revised Statutes	42
Section 3282, Revised Statutes	43
Section 35, national prohibition act	44
Section 5, act supplemental to national prohibition act	44
Treasury Decision 2993	46
Treasury Decision 3068	50

AUTHORITIES CITED.

Cases:	
Bailey v. *United States*, 276 Fed. 27	12
Duvall v. *Dyche*, 275 Fed. 440	32, 35
Ex Parte Lawrence, 273 Fed. 876	31
Gray v. *United States*, 276 Fed. 395	12, 32
Ketchum v. *United States*, 270 Fed. 416	11
Krnich v. *McCleary*, 134 N. E. 462	23
License Tax Cases, 5 Wall. 462	22
Payne v. *United States*, 279 Fed. 112	32
Reed v. *Thurmond*, 269 Fed. 252	16
Reo Atlanta Company v. *Stern*, 279 Fed. 422	32
Rossman v. *United States*, 280 Fed. 950	13
Sanford v. *United States*, 274 Fed. 369	11, 12
The Tuscan, 276 Fed. 55	32
United States v. *Barnes*, 222 U. S. 513	20, 21
United States v. *Dowling*, 278 Fed. 630	14
United States v. *Johnston*, 124 U. S. 236	35

Cases—Continued. Page.

United States v. *Mark Boasberg* (D. C. Eastern La.)..... 16
United States v. *Moore*, 95 U. S. 760..... 35
United States v. *Nixon*, 235 U. S. 231..... 38
United States v. *One Buick Roadster*, 280 Fed. 517..... 32
United States v. *One Essex Touring Automobile*, 276 Fed. 28..... 32
United States v. *One Hudson Touring Car*, 274 Fed. 473..... 15
United States v. *One Cole Aero Eight Automobile*, 273 Fed. 934... 32
United States v. *One Haynes Automobile*, 274 Fed. 926..... 12
United States v. *2,000 Cases of Whiskey*, 277 Fed. 410..... 13
Youngblood v. *Sexton*, 32 Mich. 406..... 24
Yuginovich v. *United States*. 256 U. S. 450..... 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 25, 26, 30, 31, 32, 33, 35, 37, 39
Eighteenth amendment..... 7
Statutes:
Section 923, Revised Statutes..... 15
Section 2865, Revised Statutes..... 17
Section 3062, Revised Statutes..... 15
Section 3082, Revised Statutes..... 14, 15, 17
Section 3242, Revised Statutes..... 3, 4, 5, 13, 26, 35, 38, 41
Section 3244, Revised Statutes..... 4, 47, 49, 54
Section 3257, Revised Statutes..... 6
Section 3258, Revised Statutes. 2, 3, 4, 5, 13, 31, 32, 33, 34, 35, 41, 47, 48, 49
Section 3259, Revised Statutes..... 17, 18
Section 3260, Revised Statutes..... 17, 18
Section 3265, Revised Statutes..... 13, 49, 54
Section 3268, Revised Statutes..... 18
Section 3271, Revised Statutes..... 17
Section 3279, Revised Statutes..... 6
Section 3281, Revised Statutes..... 2, 3, 5, 6, 12, 31, 35, 42
Section 3282, Revised Statutes..... 2, 3, 4, 5, 6, 35, 43
Section 3293, Revised Statutes..... 17
Section 3450, Revised Statutes..... 12, 32
Section 3453, Revised Statutes..... 13, 14
18 Stat. 310 (act of Feb. 8, 1875)..... 36
34 Stat. 1246 (criminal appeals act)..... 2, 4
41 Stat. 305 (national prohibition act)..... 3, 4, 6, 7, 8, 9, 12, 13, 19, 20, 21, 23, 26, 32, 34, 38
Title II, section 3..... 28
Title II, section 18..... 33, 34, 50
Title II, section 25..... 33, 34
Title II, section 29..... 19
Title II, section 35..... 5, 28, 30, 44, 45
Title III..... 27, 28, 45
Title III, section 9..... 34
42 Stat. 222 (act supplemental to the national prohibition act). 4, 11, 39
Section 5..... 5, 6, 29, 30, 44

MISCELLANEOUS.

Treasury Decision 2993..... 34, 46, 51
Treasury Decision 3068..... 34

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *v.* CHRIS ELIOFF STAFOFF, ALIAS CHRIS Elioff.	No. 26.

IN ERROR TO DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

JAMES L. BROOKS *v.* UNITED STATES OF AMERICA.	No. 197.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, PLAINTIFF in error, *v.* GEORGE REMUS, HARRY F. BROWN, otherwise called Harry Brown and A. Brown, George Conners, et al.	No. 403.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The facts involved in these three cases, and the manner in which the issue was raised in each, are as follows:

Stafoff case.

Chris Elioff Stafoff, alias Chris Elioff, the defendant in error, and another were indicted in the District Court for the Eastern District of Missouri for alleged violation of the laws relating to the traffic in intoxicating liquor, in that (count 1) they did possess a certain still set up without registering it with the collector of internal revenue and (count 2) did make a mash fit for distillation on premises other than a distillery. (R. 3–4.) Demurrer to two counts charging offenses against sections 3258 and 3282 of the Revised Statutes was sustained (R. 5), and the case comes here by writ of error sued out under the authority of the criminal appeals act of March 2, 1907. (34 Stat. 1246; R. 8–9.)

Brooks case.

James L. Brooks was convicted in the District Court for the District of Arizona for violating sections 3258, 3281, and 3282 of the Revised Statutes. (R. 12.) Writ of error was sued out by the defendant (R. 39), and the Circuit Court of Appeals for the Ninth Circuit certified certain questions to the Supreme Court concerning which it desires instructions. The questions certified, four in number, are as follows:

1. Are the revenue laws of the United States, and particularly the offense defined in section 3258 of the Revised Statutes, repealed by the national prohibition act enacted October 28, 1919, and effective from and after January 16, 1920?

2. Is the revenue law of the United States and the offense defined in section 3281 repealed by said national prohibition act?

3. Is the revenue law of the United States and the offenses defined in section 3282 repealed by said national prohibition act?

4. In case it shall be decided by the Supreme Court that the sections of the Revised Statutes above named, and the offense therein defined, have been repealed by virtue of provisions of said national prohibition act, should the United States Circuit Court of Appeals for the Ninth Circuit set aside the judgment and sentence imposed in said cause by the United States District Court for the District of Arizona, and remand said cause to said court, with instructions to enter judgment and impose sentence upon the plaintiff in error herein, in accordance with the provisions of said national prohibition act?

Remus case.

George Remus and others were indicted in the southern district of Ohio, the indictment containing seven counts, the first count of which charged a conspiracy to violate the national prohibition act and the other six counts charged violations of section 3242, Revised Statutes, by carrying on the business of a wholesale and of a retail liquor dealer, and of a rectifier, without payment of the special tax provided

for in section 3244, Revised Statutes. (R. 1–5.) Demurrers were interposed and the court sustained them as to the six counts charging violations of section 3242, Revised Statutes, and overruled them as to the conspiracy count. (R. 32–44.) Counts 2 and 3 of the indictment charge the carrying on of the business of a wholesale liquor dealer without having paid the special tax (R. 3); and counts 4 and 5, the business of a retail liquor dealer (R. 3–4); and counts 6 and 7, the business of a rectifier (R. 4–5).

The case comes here by writ of error sued out under authority of the criminal appeals act. (34 Stat. 1246; R. 46.)

QUESTION INVOLVED.

Simply stated, the issue presented by these combined cases is, to what extent, if at all, the national prohibition act (41 Stat. 305) as modified and amplified by the act supplemental to the national prohibition act (42 Stat. 222), repeals all the old internal revenue laws applicable to the traffic in intoxicating liquor.

In the *Stafoff case*, involving sections 3258 and 3282, Revised Statutes, the court in its memorandum on the demurrer to the indictment states that, "So far as I can see, the Volstead Act covers and punishes not only the act charged against the defendants here, but also every other act and situation which can possibly arise" (R. 8), its conclusion, therefore, being that the internal revenue laws regulating the liquor traffic were entirely repealed.

The first three questions presented by the certificate in the *Brooks case* do not confine the query to

whether the named sections of the internal revenue laws are repealed as to beverage liquors, but propound the broad question whether the national prohibition act wiped off the statute books in entirety the sections of law involved.

In sustaining the demurrer to the *Remus case*, the court, applying the ruling laid down in the case of *United States* v. *Yuginovich* (256 U. S. 450), held that in spite of section 5 of the supplemental act to the national prohibition act, Revised Statutes, section 3242 is so far repealed that to charge an offense for its violation it is necessary to allege and prove that the defendant intended the liquors for non-beverage use.

STATUTORY PROVISIONS.

Four different sections of the Revised Statutes are involved in the three cases as follows:

Revised Statutes, 3242, Remus.
Revised Statutes, 3258, Stafoff and Brooks.
Revised Statutes, 3281, Brooks.
Revised Statutes, 3282, Stafoff and Brooks.

The latter two sections, 3281 and 3282, of the Revised Statutes were considered in the Yuginovich decision, so the force and effect of that case must be considered herein.

Section 35 of the national prohibition act and section 5 of the act supplemental to the national prohibition act are the applicable provisions of the prohibition laws. These statutes are set out in full in the appendix to this brief.

IMPORTANCE OF THE QUESTION.

In *United States* v. *Yuginovich* (256 U. S. 450), this court, accepting the construction of the lower court that the indictment had relation only to intoxicating liquors intended for beverage purposes, held that sections 3257, 3279, 3281, and 3282, Revised Statutes, were repealed by the national prohibition act so far as concerns the production of liquor for beverage purposes. Sections 3281 and 3282 are involved also in the cases now before us, *but a new element has entered into the consideration of the repeal of the internal-revenue statutes since the decision of this court in the Yuginovich case, to wit: The further declaration of Congress of an intent to preserve the applicability of the internal-revenue statutes as to both beverage and nonbeverage liquors.*

This intent of Congress appears in the following language from section 5 of the act supplemental to the national prohibition act passed on November 23, 1921:

> That all laws in regard to the manufacture and taxation of, and traffic in, intoxicating liquor *and all penalties for violations of such laws* that were in force when the national prohibition act was enacted *shall be and continue in force as to both beverage and nonbeverage liquor* except such provision of such laws as are *directly in conflict* with any provision of the national prohibition act or this act. [Italics ours.]

It is not out of place, we think, to suggest to the court the importance of the question presented here

in enforcing the laws relating to the traffic in liquor. The internal-revenue, customs, and smuggling laws are of great value in enforcing the eighteenth amendment to the Constitution. The national prohibition act is a new statute designed, it is true, to carry out the provisions of the eighteenth amendment. We do not believe, however, that it does, nor did its framers intend it to, meet all emergencies which arise in regulating and controlling illicit manufacture, sale, transportation, and importation of intoxicating beverages. It would, indeed, be unusual to have a new statute framed to meet the emergencies incident to initiating a new governmental policy fully adequate to do so. It seems reasonable to presume, therefore, that the national prohibition act begins where these other statutes that have grown up slowly through the experience of the Government dealing with smugglers, moonshiners, and tax evaders left off, or where the new policy of the Government adopted in the eighteenth amendment renders the operation of formerly effective laws inconsistent and conflicting. Merely because violations and penalties therefor might be overlapping is not alone a sufficient reason to suppose the legislature intended to substitute the new law for the old. Intent must be gathered from the purpose to be effected and the evil to be remedied.

Effective assistance may be received by enforcement officers from the existing customs and revenue laws if it is finally determined by this court that the national prohibition act and the supple-

mental act have not repealed the prior existing statutes relating to intoxicating liquor. That assistance is being felt in districts where the courts have held them not repealed; whereas enforcement is crippled where district judges have adopted the view that the effect of the *Yuginovich* decision was a sweeping repeal of internal revenue and customs statutes as to beverage liquors. It bars the Government from invoking in the cause of prohibition, laws which, in the past, were effective in controlling the illicit traffic in liquor. To control is the first step toward prohibiting. The Congress can not have meant to remove all formerly attached "brakes" from a great nation-wide traffic, and depend on this small newly erected legal barrier in the form of the national prohibition act to halt it.

The passage of the national prohibition act placed a premium upon violations of the internal-revenue and customs laws so far as intoxicating liquors are concerned. Prior to its passage the only advantage to be gained by violating these laws was to avoid payment of taxes or duties. Prohibition upon the use of intoxicating liquor for beverage purposes, to which use the far greater portion of liquors were put, resulted in an immediate jump in price. The tremendous profits offered to successful participants in the illegal trade have brought to the front a class of persons ready to assume the risk entailed. It is common knowledge that rich rewards are to be gained and that the illicit traffic has reached immense proportions. We can not believe Congress declared

a purpose, to wit, the destruction of the beverage liquor traffic, and then repealed by implication the laws which would unquestionably assist in attaining that end.

The system of internal revenue laws was devised primarily for a dual purpose, to wit, taxing *and regulating*. Great difficulty has been experienced by the Government for years in its every effort to regulate or control the traffic in intoxicating liquors. The passage one after another of the internal revenue and customs laws inflicting grave penalties for nonconformity to seemingly trivial regulations they set up (such as marking the location of a still and registering it as soon as set up, exhibiting receipts in conspicuous places, and many other similar requirements) bear testimony to the Government's struggle to "regulate." The passage of an act of such sweeping prohibitions as the national prohibition act has greatly increased the difficulties confronting officers of the internal revenue and customs bureaus. The hardy mountaineer moonshiner formerly furnished his greatest problem in lawlessness. To-day professional criminals are forsaking their old "trades" of second-story work, safe cracking, and highway robbery for the "bootleg business" with its minimum of risk and rich returns. It is an alarming fact that skilled lawbreakers have organized vast interstate conspiracies to import and sell liquors contrary to the eighteenth amendment and the laws of the United States. The "master minds" of such conspiracies are cunning criminals of erstwhile diverse criminal pursuits, but

they depend largely on ignorant seamen, truck drivers, and foreigners to execute the details of their conspiracies. Their many tentacled forms of law violation (including importation, illicit distilling, rectifying, forging internal-revenue stamps, storing in "outlaw" warehouses, fake warehouse robberies, and distribution of diluted qualities of liquors) can only be ensnared with the help of the whole network of internal revenue and customs laws. The internal-revenue statutes almost all carry minimum penitentiary or jail sentences. Detection of a violation of one or more of these laws and institutions of prosecution against one of the "smaller fry" in a large conspiracy is frequently the means of uncovering the whole scheme, and thereby apprehending the real criminals who set in motion the plan of lawlessness and who are reaping from it rich rewards.

It is therefore of great importance for this Government, confronted with the difficult problem of the enforcement of the policy of the eighteenth amendment, to preserve the system of internal revenue and customs laws relating to intoxicating liquor in their entirety. They carry adequate punishment for every violation. Precedents in the mode of their enforcement have been established. The internal-revenue officers on whom is placed also the burden of enforcing national prohibition are familiar with their terms and application. It is vital to their preservation that the decision of this court in the *Yuginovich case* be applied by this court in these instant cases in the light of the subsequent

passage of the act supplemental to the national prohibition act. It is hoped that the decision may be so explained that it will cease to be misused as a general blanket authority for the repeal of internal revenue laws. Such explanation by this court will harmonize the now existing diversity of opinion among the various district and circuit court judges on the effect that the national prohibition act and acts supplemental to the national prohibition act have had on the internal revenue and customs statutes.

Examples of the misapplication of the Yuginovich decision by district and circuit courts.

The Government has been embarrassed in its attempts to enforce uniformly the laws relating to intoxicating liquor by the misapplication which many district and circuit judges have placed upon this court's decision in the *Yuginovich case*. As we view it, there is nothing in that decision to indicate that this court intended a sweeping repeal of all internal revenue laws. Yet the Circuit Court of Appeals for the Eighth Circuit, in the case of *Sanford* v. *United States*, 274 Fed. 369, held, with regard to a section of the internal revenue laws not covered by the *Yuginovich* decision, as follows:

> As it has been conclusively determined by the decision of the Supreme Court in the *United States* v. *Boze Yuginovich et al.*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, wherein the opinion was filed June 1, 1921, and by the decision of this court in *Ketchum* v. *United States* (C. C. A.) 270 Fed. 416, *that*

> *the sections of the statutes on which the convictions and sentences in this case were based were repealed* by the national prohibition act (41 Stat. 305), sec. 35, before the time when the offenses were alleged to have been committed, the judgment and sentences in this case must be reversed, and the defendant must be discharged. (Italic ours.)

See also *Bailey* v. *United States*, decided by the Circuit Court of Appeals for the Eighth Circuit. (276 Fed. 27.) The defendant in this case was, as in the *Sanford case* (*supra*), released after conviction in the District Court because of the interpretation the Circuit Court of Appeals placed on the *Yuginovich* decision.

In holding section 3450, Revised Statutes, repealed, the Circuit Court of Appeals for the Fifth Circuit, on July 25, 1921, stated in the case of *United States* v. *One Haynes Automobile* (274 Fed. 926) as follows:

> The Supreme Court of the United States has in the case of *United States* v. *Yuginovich* (June 1, 1921), 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, decided that this provision (section 35) of the Volstead Act must be construed in the light of the rule for construing penal statutes. "That later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty."

In the case of *Gray* v. *United States* (276 Fed. 395) the Circuit Court of Appeals for the Sixth Circuit on November 8, 1921, ruled as follows:

> Since the case came into this court section 3281 has been held repealed by the national

> prohibition act (*United States* v. *Yuginovich*, June 1, 1921, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043), at least in so far as applied to the distilling of spirits for beverage purposes * * *. Section 3258 was not involved in the *Yuginovich* case. We are unable, however, satisfactorily to distinguish that section (which makes it an offense for any person to have in his possession or under his control any still or distilling apparatus set up which is not registered as required by that section) from those held in the *Yuginovich* case to have been repealed. * * *

On May 2, 1922, the Circuit Court of Appeals for the Sixth Circuit in the case of *Rossman* v. *United States* (280 Fed. 950), held that section 3242, Revised Statutes, penalizing the carrying on of the business of manufacturing stills without the payment of special tax, and section 3265, Revised Statutes, were repealed by the national prohibition act. The defendant was convicted, and sentence reversed on the ground of the repeal of revenue statutes, the *Yuginovich case* being cited as authority therefor.

On October 20, 1921, the Circuit Court of Appeals for the Second Circuit, in the case of *United States* v. *2,000 Cases of Whisky, etc.* (277 Fed. 410) held that section 3453, Revised Statutes, was repealed, stating that the eighteenth amendment and the national prohibition act completely changed the policy of the United States, citing the *Yuginovich case* in support of its decision. This case was a libel filed to forfeit certain liquors on the ground that they had been sold or removed in fraud of the internal revenue laws.

The lower court ruled that section 3453, Revised Statutes, was not repealed and that the libel was correctly grounded. Before the formal entry of the order, the *Yuginovich* decision was rendered, and the lower court, basing its action on the *Yuginovich case*, reversed its ruling on the libel and held that section 3453 was repealed.

Even more serious than the above, as far as the effect on law enforcement is concerned, have been the decisions holding a repeal of customs and smuggling statutes under the authority of the *Yuginovich case*. The customs statutes have grown up from experience. They cover manifold and different circumstances in smuggling. The various sections interlock in their application to the law violator. No one new statute can take their place. As is pointed out in a subsequent paragraph of this brief, to break down their inhibitions, as far as intoxicating liquor for beverage purposes is concerned, places an actual premium on the smuggling into the country of an article which we have declared it is against our constitutional policy to admit, as compared with the smuggling of articles whose entrance is not contrary to public policy.

Yet the *Yuginovich* decision was declared by the District Court for the Southern District of Florida to be the authority for a judicial repeal of section 3082 of the Revised Statutes, when that section was invoked against the smuggler of intoxicating liquors. In the case of *United States* v. *Dowling* (278 Fed. 630) the court stated its conclusion thereon as follows:

> Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than section 3082, and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *United States* v. *Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. ed. 1043, the holding was as follows: "Existing penal statutes are repealed by later ones covering practically the same acts but fixing lesser penalties."

The District Court for the Eastern District of Michigan, speaking on August 6, 1921, in the case of *United States* v. *One Hudson Touring Car* (274 Fed. 473), held repealed certain provisions of the customs laws (sections 923 and 3062 of the Revised Statutes), and said:

> The enactment of the Volstead Act marked a complete departure by the Government from its former policy with respect to the importation of intoxicating liquors for beverage purposes. By that act such importation for such purposes was absolutely forbidden. It is clear, therefore, that thereafter there could be no intoxicating liquors imported for beverage purposes on which any customs duty could be paid or of which any customs entry could be made. It follows that any statute then in force providing for such payment or entry, together with any statutes imposing, or prescribing the mode of enforcing penalties for the failure to make any such

> payment or entry, were thus repealed by necessary implication. *United States* v. *Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. ed. 1043; *Reed* v. *Thurmond*, 269 Fed. 252 (C. C. A. 4).

Each decision like the above, drawing the teeth of customs statutes, has resulted in impeding the efforts of enforcement, and makes the spot of such decision a popular point of entry for smuggled liquors.

The worst example of the difficulties facing the Government by reason of what we conceive to be a misapplication and misconstruction of the doctrine enunciated in the *Yuginovich case*, is found where district judges, acting under the belief that the *Yuginovich* decision sweeps away every former recourse to internal revenue and customs statutes in controlling the illicit traffic in beverage liquor, refuse search warrants and order returned goods seized under customs laws. The law enforcement department of the Government is without redress, since there is no appeal from such orders. On June 7, 1922, in the case of *United States* v. *Mark Boasberg*, alias Jack Sheehan, Judge Foster, in the Eastern District of Louisiana, ordered the return of a ship load of liquors which had been seized under authority of a search warrant sued out under the customs laws and said, citing the *Yuginovich case* in support of his views:

> The Government can derive no comfort from the antismuggling laws. So far as the importation of intoxicating liquor is con-

cerned these sections of the Revised Statutes, to wit, sections 2865 and 3082, are impliedly repealed by the national prohibition act, which is complete in itself and clearly sufficient to prevent the importation of intoxicating liquor.

The effect of a repeal of internal-revenue laws as to intoxicating liquor for beverage purposes is to discriminate in favor of the greater law violator.

It is not reasonable to suppose that Congress intended to deal more lightly with a person who makes no attempt to comply with the law than it did with one who shows a partial compliance and an honest intent. Yet this is where the ruling that the internal-revenue statutes do apply to nonbeverage, but do not apply to beverage liquor leads us. Take this situation for example. A person undertakes to enter upon the business of distilling. Under the revenue laws he (1) constructs his distillery in accordance with the law and regulations; (2) provides a distillery warehouse at his own expense and has it approved (section 3271, Revised Statutes); (3) gives distiller's notice to the collectors (section 3259, Revised Statutes); (4) files a distiller's bond (section 3260, Revised Statutes); (5) files a warehousing bond covering spirits produced (section 3293, Revised Statutes), and in addition keeps complete records and makes returns of materials used, spirits produced, and period of time of operation. On this, in addition to the information gathered from the survey of his plant, his tax is computed. For failure to keep any one of the above-mentioned require-

ments or others not herein referred to, he is liable to heavy penalties. Each requirement bears a separate penalty and very drastic punishment in the aggregate may be imposed. For giving a false notice he may be imprisoned for two years and be fined (section 3259, Revised Statutes); for failure to give a distiller's bond or for giving a false one he may be fined $5,000 and imprisoned two years, in addition to which all real estate and distilling apparatus shall be forfeited (section 3260, Revised Statutes); if he breaks or tampers with any lock or seal placed therein by revenue officers he is liable to be fined $5,000 and imprisoned for as long as three years (section 3268, Revised Statutes). There are various other penalties which may be visited upon one who enters upon the business of distilling and in good faith meets most of the requirements but in some respect fails to follow the law. As to that person we impose the drastic internal revenue law penalties. As to the moonshiner or the bootlegger who sets up a distilling apparatus and operates it, and who admits he made no attempt to comply with the law, shall we be permitted only to invoke the penalty provided for in the national prohibition act, allowing him, by hiding behind his own wrongdoing to exempt himself from the manifold legal requirements and penalties that follow the licensed distiller? That would place us in the position of saying to the authorized distiller, "You are subject to many and varied regulations with a severe punishment for every breach thereof," and, at the same time, to the

man who complies with no law, "You are liable to punishment only under the national prohibition act, because your operations are unlawful. Other provisions of law do not apply to you, and your punishment can not exceed a fine of one thousand dollars and imprisonment of six months." (Sec. 29, national prohibition act.) The breaking down of internal-revenue statutes as to beverage liquors causes such discrimination in favor of the greater violator; the more flagrant the offense the less severe the punishment, and the less complex are the regulations of law that surround it.

A repeal of the smuggling statutes in so far as they may apply to beverage liquors presents a still more flagrant discrimination.

Any person who imports or brings into the United States goods in violation of the customs laws, who transports, conceals, or sells such goods after importation, may be fined five thousand dollars and imprisoned two years. For importation, transportation, or possession under the national prohibition act the greatest punishment for a first offense is a fine of not more than five hundred dollars. Therefore, if the national prohibition act alone survives as to beverage liquors there arises the following situation—for the clandestine importation of empty whisky *bottles*, imprisonment of two years and a fine of five thousand dollars could be imposed; for unlawful importation of *whisky*, a fine of five hundred dollars would be the maximum. Clearly, no such intention could have been in the mind of Congress.

The customs laws must be retained in full force and effect as to beverage as well as nonbeverage liquors. They have been builded slowly as a wall by recommendation of Government officials who deal with the smuggler and the conspirator against our laws. Surely Congress in enacting the national prohibition act did not intend thereby to substitute its inadequate and untried provisions in place of statutes that have "teeth" and have proved an effective barrier to frauds upon our laws. To have so intended would have made it easier for the lawless class to smuggle a *prohibited* article than one not declared by our law to be outlawed per se. On the contrary, Congress must have realized that these systems of interlocking statutes (internal revenue and customs) furnished the greatest assistance to an adequate control of the whole system of manufacture and distribution of intoxicating liquor to whatever final use it might be intended. It is reasonable to conclude, therefore, that the national prohibition act began where they left off. At the time of the passage of that act this court had already spoken in the case of *United States* v. *Barnes* (222 U. S. 513), concerning the necessity of internal revenue laws and the construction to be given them in the light of subsequent legislation, as follows (p. 520):

> Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled

> rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. * * * The more natural if not the necessary inference in all such cases is that the legislature intends the new laws to be auxiliary to and in aid of the purposes of the old law, *even when some of the cases provided for may equally be within the reach of each.* There certainly, under such circumstances, ought to be a *manifest and total repugnancy* in the provisions to lead to the conclusion that the latter laws abrogated and were designed to abrogate the former. (Italics ours.)

We believe Congress passed the national prohibition act in the light of the *Barnes* decision, and that there is no manifest and total repugnancy between the system of internal revenue and customs laws and the national prohibition act. They form a complicated system of checking evasions of internal revenue officers and methods of imposing taxation, the effect of both being to discourage law violation and strengthen law enforcement.

There is no inconsistency in taxing a prohibited traffic.

Distaste in taxing a prohibited business comes from the wrong theory of what the payment of a tax means. It does not mean giving a protection from the Government in return for the tax. That point

> *confers upon the general assembly the power to enact laws to make such prohibition effective.* (Italics ours.)

Judge Cooley, when he was considering the right of the State of Michigan to tax an illegal business, said in the case of *Youngblood* v. *Sexton* (32 Michigan, 406, 421, 426):

> The idea that the State lends its countenance to any particular traffic by taxing it seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition under such circumstances that a thing is sanctioned and countenanced by the Government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine any citizen would prefer to be visited with the untaxed frowns of Government rather than with those testimonials of approval which are represented by the demands of the taxgatherer. * * *

> *If one puts the Government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual.* Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable. (Italics ours.)

In the *Yuginovich case* this court said that Congress under the broad authority of the taxing power may tax intoxicating liquors illegally as well as legally produced, and that in the national prohibition act Congress had manifested such intention.

Repeal of internal-revenue statutes as to one kind of liquor and not another is an unworkable division of the law.

Experience has shown that the division of a statute to apply to one kind of liquor (nonbeverage) and not to apply to another (beverage) is an unnatural application of law. There is nothing in the *appearance* of liquors that have been seized coming over the border to tell whether they are intended for legal or illegal use. That must remain, since it is a question of intent, a fact peculiarly within the knowledge of the law violator. To thus establish such a false line of cleavage in the appli-

cability of the law permits a wrongdoer to plead his own wrong and excuse himself from payment of heavy duties or taxes, and, at the same time, evade the charge of defrauding the Government by slipping around the "fence" of customs or internal-revenue provisions erected for law-abiding citizens. *Because a man violates one law has never meant in the history of jurisprudence that he does not, by the same act, become liable under any other law.* A thief is also guilty of trespass.

In one of the instant cases—the *Remus case*—George Remus, charged before the court with conspiring with others to violate the national prohibition act, and also with practicing a fraud on the Government by carrying on the business of a wholesale and retail liquor dealer and a rectifier without having paid the tax under the provisions of the Revised Statutes, section 3242, appeared before the court and his contention amounted to this:

> I may have conducted the business of a liquor dealer and rectifier, and so handled thousands of gallons of liquors, but the Supreme Court has said I am not disobeying Revised Statutes, section 3242, unless my business was for a lawful nonbeverage purpose, and I challenge the Government to allege or prove that one gallon of my liquors was rectified or sold for any lawful purpose.

Judge Peck decided that the *Yuginovich* decision meant to exempt such men as Remus from complying with provisions of internal revenue laws, and dismissed those counts against him.

It does not work to make the efficacy of a statute rely on the *intent* to which a law violator was to put the article. Either the revenue and customs statutes should apply alike to the dealer in beverage and nonbeverage liquors or they should be declared repealed as to all. But they can not be considered to be repealed entirely, since they still furnish the only regulatory legislation along many lines, relating to intoxicating liquors.

The only provision for the production of whisky at the present time is under these various provisions of internal revenue laws, since it can not be produced under Title III of the national prohibition act which relates to the production of alcohol only. Liquors, except alcohol, are produced as heretofore, under internal revenue provisions, the "permit" features only being added by the national prohibition act. Title III covers *only the production of alcohol*, leaving otherwise the whole field of law covering the production of spirituous liquors the same as before prohibition, except as to the requirements set up in the national prohibition act for securing a "permit" from the Commissioner of Internal Revenue. The sections of the Revised Statutes covering the production of alcoholic liquors other than those superseded by Title III (relating to industrial alcohol) are entirely harmonious with prohibition enforcement. They run along with, instead of contrary to, its purpose.

If, then, these statutes are still necessary as to the production of all liquors other than industrial alcohol

(provided for in Title III of the act), it is apparent that the Government retained its policy to tax—*and punish for an evasion of that tax*—the commodity known as intoxicating liquor. Certainly he who, in violation of many laws, slips this taxable commodity into the channels of commerce, defrauds the Government of revenue to which it was justly entitled. The heavy penalties for the nonperformance of regulations in internal revenue laws accompanying and safeguarding the payment of the tax itself are punishment for the revenue fraud, and are, therefore, separate penalties, based on a separate conception of the wrongdoing of the defendant from just his violation of the prohibition policy of the United States, punishment for which is provided for in the national prohibition act.

Congress indicated intention to retain existing liquor laws.

The expression of Congress as contained in section 3, Title II, of the act, wherein it says that—

> all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented,

should be read in connection with that portion of section 35 which provides that—

> all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

And section 5 of the act supplemental to the national prohibition act, which provides, in part—

> that all laws in regard to the manufacture * * * and traffic in intoxicating liquor, * * * that were in force when the national prohibition act was enacted, shall be and continue in force, as to *both beverage and non-beverage liquor*, except such provisions of such laws as are directly in conflict. (Italics ours.)

The above-quoted provisions indicate a desire on the part of Congress to avail itself of every possible means to effectively regulate the liquor traffic and to put an end to it for beverage purposes. This intent is further substantiated by the fact that Congress deliberately imposed the duties of enforcement of prohibition on the Commissioner of Internal Revenue by reason of the numerous internal revenue laws which could be invoked and make enforcement by this officer effective and reasonably economical without unduly hampering legitimate business.

So long as there is a tax on intoxicating liquor and the Commissioner of Internal Revenue has full control of its production at the source, its tax payment, sale, and use, all tax-free withdrawals which must be credited against the bonded accounts, use of d natured alcohol, the exportation, transportation, and importation to a limited extent, all under internal-revenue laws; and has a well qualified and equipped force of officers here and in the field, as well as a laboratory for determination of fitness or unfitness of preparations for beverage purposes, the advantage of the internal-revenue laws in the enforcement of prohibition will be apparent.

The Yuginovich decision not controlling in instant cases.

When this court decided the *Yuginovich case* it was applying the intent of Congress as gathered in part from the language of section 35 of the national prohibition act, *supra*, which provided that laws inconsistent with said act "are repealed only to the extent of such inconsistency." In addition to section 35, we now have the views of Congress reenunciated in stronger terms in section 5 of the act of November 23, 1921, by which all prior laws controlling the traffic in intoxicating liquor are continued in force except "such laws as are directly in conflict with any provision of the national prohibition act." To hold repealed the sections involved in the *Yuginovich case*, the court had only to find an *inconsistency* between them and the national prohibition act; to warrant a similar finding in the instant cases the laws must be found to be *directly in conflict*.

Furthermore, the act supplemental to the national prohibition act provides that if an act is an offense under two different laws a conviction under one shall be a bar to prosecution under the other. This plainly indicates that Congress intends both laws to remain in full force, but places discretionary power in the prosecuting officer to choose the statute under which to proceed against the law violater. This also makes clear a question raised in the *Yuginovich case*, to wit, whether Congress intended to retain both the penalties under the national prohibition act and internal-revenue statutes. The act supplemental

makes it plain that such was the intent of Congress but it is provided that having been punished under one statute further penalties under others can not also be piled up against the wrongdoer.

The view that the *Yuginovich case* repealed internal-revenue and the customs laws as they affect intoxicating liquor has not been accepted by all courts.

In the case of *Ex parte Lawrence* (273 Fed. 876), decided by the District Court for the District of Montana shortly after the decision by this court in the *Yuginovich case*, an indictment was held good which charged violations of sections 3258 and 3281, Revised Statutes, and the following was said:

> The applications are based upon the contention that said sections of the revenue laws are repealed by said act, and in consequence the sentences are void and imprisonment illegal; and in support thereof the decision by the Supreme Court in the *Yuginovich case* (256 U. S. 450, 41 Sup. Ct. 551, 65 L. ed. 1043) is cited. *This decision has been anxiously awaited by courts hopelessly divided in respect to the extent that the eighteenth amendment and act repeal the old revenue laws, and yet it little clarifies the problem. It determines that certain sections of the old revenue laws, including two here involved, are partially repealed or superseded; but it is in view of circumstances that may or may not be present here and in any other case, dependent apparently upon the particular court's construction of the indictment before it and whether that construction is based on con-*

jecture or surmise, or on the language in the indictment used. (Italics ours.)

The same court also sustained a libel brought under section 3450, Revised Statutes, seeking to forfeit an automobile used in removing and selling whisky with intent to defraud the Government of the tax. *United States* v. *One Cole Aero Eight Automobile* (273 Fed. 934). See also *United States* v. *One Buick Roadster* (280 Fed. 517).

After consideration of the *Yuginovich case*, the District Court for the Northern District of Georgia, in the case of *United States* v. *One Essex Touring Automobile* (276 Fed. 28), held that section 3450, Revised Statutes, was not repealed by the national prohibition act. The District Court in this case reviewed its former ruling and held that the principles laid down in the *Yuginovich* decision were inapplicable to the case before it. See also *Reo Atlanta Company* v. *Stern* (279 Fed. 422). The same result as regards the same section was reached by the District Court for the Southern District of Alabama in the case of *The Tuscan* (276 Fed. 55).

The Circuit Court of Appeals for the Fifth Circuit in the case of *Payne* v. *The United States* (279 Fed. 112) held section 3450, Revised Statutes, unaffected under the facts in that case by the *Yuginovich* decision.

The district court for the Northern District of Georgia held that section 3258, Revised Statutes, was not repealed by the national prohibition act. *Duvall* v. *Dyche* (275 Fed. 440).

An examination of the cases referred to herein demonstrates that the courts, Circuit Courts of Appeal as well as District Courts, are in hopeless conflict on the question now at issue and to what extent this court intended its ruling in the *Yuginovitch* decision to be generally applied.

Sections of Revised Statutes separately considered.

Section 3258 provides a penalty for failure to register forthwith the setting up of any still or distilling apparatus.

This section was not considered in the *Yuginovich case*. Some courts have held it repealed as to beverage liquor by analogy to the sections involved in the *Yuginovich case* (*Gray* v. *U. S. supra*); others have held that it is unaffected by that decision (*Duvall* v. *Dyche, supra*).

In fact, section 3258 differs materially from sections involved in the *Yuginovich case*. Just two sections of the national prohibition act relate in any way to stills. Section 25 of Title II provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used and no property rights shall exist in any such liquor or property.

Section 18 of the act provides:

> It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, directions, or recipe

advertised, designed, or intended for use in the unlawful manufacture or use of intoxicating liquor.

Section 25 makes possession of a still *unlawful only when it was intended for use to violate* the national prohibition act, and section 18 prohibits it *only where it is held for sale.*

Section 3258 requires every person having a still under his custody or control *to register* the same *if it is set up.* This section is not in conflict with the national prohibition act. On the contrary it is of the greatest benefit for the Commissioner of Internal Revenue to have a means of ascertaining the stills in existence from which illicit beverage liquors might be produced contrary to law.

Two other facts negative the idea that section 3258 was repealed by the national prohibition act. The first is that section 9 of Title III of the national prohibition act relating to the establishment of industrial alcohol plants specifically exempts them from the provisions of section 3258, which compels the inference that as to all other matters relating to intoxicating liquors section 3258 retains its vigor. Another fact establishing the necessity of this section to supplement the national prohibition act is that Treasury Decision 2993 and Treasury Decision 3068 (set out in full in the appendix hereto, pp. 46–55), based on the provisions of Revised Statutes, section 3258, were promulgated by officials charged with the duty of prohibition enforcement.

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. *United States* v. *Moore* (95 U. S. 760); *United States* v. *Johnson* (124 U. S. 236).

The District Court for the Northern District of Georgia considered the practical effect of applying the reasoning of the *Yuginovich* decision to this section with the effect of leaving it in force as to stills manufacturing nonbeverage and repealed as to stills manufacturing beverage liquors, and, *deciding against any* implied repeal of the statute, put the case clearly as follows in *Duvall* v. *Dyche* (275 Fed. 440, 442):

> *The intention with which a still is set up is hardly a practical test of whether it must be registered or not. There is no hardship and great security in having all registered on being set up,* save those for industrial alcohol, when the plant itself is registered. R. S., par. 3258, is still of force, with an exception as to stills in industrial alcohol plants, ingrafted on it, which exception of course may be pleaded in a proper case. [Italics ours.]

Section 3281 is aimed at a person who carries on the business of a distiller with intent to defraud or without giving bond as required by law. Section 3282 was designed to reach the making in and removing from any premises not a duly authorized distillery

of a mash fit for distillation. These sections are not in conflict with the national prohibition act. Their purpose was to protect the revenue by compelling observance of the law. They were considered in the *Yuginovich* decision, but prior to the passage of the act supplemental to the national prohibition act.

Section 3242, Revised Statutes, as amended by section 16 of the act of February 8, 1875 (18 Stat. 310), provides that any person who shall carry on the business of a (1) rectifier, (2) wholesale liquor dealer, (3) retail liquor dealer, (4) wholesale dealer in malt liquors, (5) retail dealer in malt liquors, or (6) manufacturer of stills, without the payment of special tax, or who shall (7) carry on the business of distiller without giving bond, or (8) carry on the business of a distiller, with intent to defraud the United States of tax, shall be punished as therein set out. The national prohibition act does not outlaw any of the businesses covered by this section; it merely adds to the other requirements the necessity of securing a permit.

Rectification is nowhere mentioned in the national prohibition act, yet most of the bootleggers are engaged in the business of rectification. Very few are distributing bottled in bond liquors. Most of them mix alcohol with coloring and a diluting fluid and call it whisky or, having added juniper, market gin or some vicarious product. Almost all commercial violators of the national prohibition act, if their operations are on any large scale, are violating this section. To construe (as was done in the court below in

the *Remus case*) this section repealed as to beverage liquors, permits (as was done in the court below) the wrongdoer to plead his own wrong for the purpose of having the charge dismissed against him as to this statute. Applying the *Yuginovich* decision as authority for the complete repeal of this section as to beverage liquors so that the Government would be obliged to *allege* that the defendant intended the rectified spirits for nonbeverage use is, we maintain, one of the best examples of misapplication of the *Yuginovich* ruling herein referred to.

Taxes are still due on the production of liquor, and this court has decided that the illegality of production does not remove from Congress the power to tax. There is no *inconsistency* in adding another requirement, to wit, obtaining of a permit, to those already existing, to wit, payment of tax or furnishing of bond. Still more obviously there is no *direct conflict*. This section was designed to protect the revenue; a tax is still imposed; therefore there is still revenue to be protected. The impelling motive of Congress in passing the national prohibition act was not to cut down its source of revenue, but to destroy a portion of the liquor traffic. The decrease in revenue is incidental to this policy, but was not the moving purpose. Collection of revenue is of tremendous importance to Congress, and we should not impute to it the purpose in adopting a policy which as an incident destroys a portion of the traffic which produced considerable revenue, to remove the safeguard and pro-

tection previously given to such revenue by section 3242, Revised Statutes.

So far as the fourth question presented by the Circuit Court of Appeals in the *Brooks case* is concerned, it is submitted that if the court should find the revenue statutes involved inapplicable, the Circuit Court of Appeals should be directed to remand the case to the District Court for the imposition of sentence in accordance with the national prohibition act. It is quite apparent the counts in this indictment were not drafted to charge an offense under the national prohibition act. They are, however, sufficient to charge violations of the revenue statutes. If the revenue statutes are found to be in direct conflict with the national prohibition act, it results that a count which charges an offense under one must also charge an offense under the other. Otherwise there is no conflict or inconsistency. The validity of an indictment is determined as a matter of law from the facts charged, and it is not controlling that the lower court entirely overlooked the statute which would sustain an indictment. *United States* v. *Nixon* (235 U. S. 231).

We maintain that the *Yuginovich* decision was not intended to have the broad effect ascribed to it of repealing all internal-revenue and customs statutes as far as they may be applied to beverage liquor. We further submit that any doubt that may have existed as to the effect of the national prohibition act on previously existing statutes relating to the regulation of the traffic in intoxicating liquor has

been removed by the Willis-Campbell Act. Only certain sections of the revenue statutes are specifically presented here. Many others will be controlled by the decision. Effective regulation of the liquor traffic requires severe penalties; of the need for the revenue statutes to assist enforcement there can be no denial; that Congress desires the national prohibition act reenforced by the revenue and customs laws is demonstrated by its unqualified language; and that diversity of rulings by different courts has produced a chaos of decisions can not be controverted. Congress expressed its intention as to repeal in the national prohibition act. The doctrine of repeal laid down by this court in the *Yuginovich case* has been misconstrued and misapplied. Since then a stronger statement in more emphatic words reiterating the intention to retain the penalties of the internal-revenue laws has been received from Congress in the supplemental act. It lies in the power of this court to remove all doubt that has grown up in this question and clear the air of uncertainty arising from diversity of legal opinion by an interpretation in the instant cases which will effect the intention of Congress and check the misapplication of the *Yuginovich* decision.

CONCLUSION.

It is respectfully submitted—

(1) That the decision and judgment of the District Court for the Eastern District of Missouri in the *Stafoff case* should be reversed;

(2) That the first three questions certified by the Circuit Court of Appeals for the Ninth Circuit in the *Brooks case* should be answered in the negative and the fourth question in the affirmative; and

(3) That the decision and judgment of the District Court for the Southern District of Ohio in the *Remus case* should be reversed.

JAMES M. BECK,
Solicitor General.

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Assistant Attorney General.

HOWARD T. JONES,
Attorney.

NOVEMBER, 1922.

APPENDIX.

Four different sections of the Revised Statutes are involved in the three cases, as follows:

"SEC. 3242 as amended by sec. 16 (act of February 8, 1875 (18 Sta. 307)). That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years. * * *

"SEC. 3258. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner of Internal Revenue. Stills and distilling apparatus shall be registered

immediately upon their being set up. Every still or distilling apparatus not so registered, together with all personal property in the possession or custody or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and shall be fined not less than one hundred dollars, nor more than one thousand dollars, and imprisoned for not less than one month, nor more than two years.

"SEC. 3281. Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for a compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried

on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

"SEC. 3282. No mash, wort, or wash fit for distillation or for the production of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall, by distillation or by any other process separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol or any vapor of alcoholic spirits in manufacturing vinegar or any other article or in any process of manufacture whatever unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than five hundred dollars nor more than five thousand dollars and be imprisoned not less than six months nor more than two years: *Provided further*, That nothing in this section shall be construed to apply to fermented liquors or to fermented liquids used for the manufacture of vinegar exclusively. But nothing herein contained shall be construed to

authorize the distillation of such fermented liquids except in an authorized distillery."

Section 35 of the national prohibition act: All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court, and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Section 5, act supplemental to the national prohibition act: That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the national prohibition act was enacted, shall be and continue in force, as to

both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the national prohibition act or of this act; but if any act is a violation of any such laws and also of the national prohibition act or of this act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the national prohibition act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal-revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the transportation act of 1920 or the merchant marine act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the national prohibition act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the national prohibition act.

(T. D. 2993.)

INSTRUCTIONS RELATIVE TO THE MANUFACTURE, REMOVAL, AND REGISTRY OF STILLS.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To collectors of internal revenue, Federal prohibition directors, and others concerned:

Section 3265, R. S., reads as follows:

"Any person who manufactures any still, boiler, or other vessel to be used for the purpose of distilling shall, before the same is removed from the place of manufacture, notify in writing the collector of the district in which such still, boiler, or other vessel is to be used or set up, by whom it is to be used, its capacity, and the time when the same is to be removed from the place of manufacture; and no such still, boiler, or other vessel shall be set up without the permit in writing of the said collector for that purpose; and any person who sets up any such still, boiler, or other vessel, without first obtaining a permit from the said collector of the district in which such still, boiler, or other vessel is intended to be used, or who fails to give such notice, shall pay in either case the sum of five hundred dollars, and shall forfeit the distilling apparatus thus removed or set up in violation of law."

Under this section any person who manufactures any still, boiler, or other vessel to be used for the purpose of distilling shall, before removal from the place of manufacture, notify in writing the collector of the district in which such still or boiler or other

vessel is to be used or set up, by whom it is to be used, its capacity, and the time when the same is to be removed from the place of manufacture. The section in question also provides that no such still, boiler, or other vessel shall be set up without a permit in writing from the collector for that purpose.

Failure to give the notice of intention to remove and obtain the permit to set up a still is punishable in the sum of $500, and the apparatus is forfeitable to the Government. This applies to any and all stills of whatever size or capacity.

Section 3244 of the Revised Statutes requires manufacturers of stills to pay $50 for engaging in the business, and $20 special tax for each still or worm made by them for distilling purposes. This section also provides that any person who manufactures any still or worm to be used for distilling shall be deemed a manufacturer of stills. Subsection 18 of section 3244 provides that a distiller in a registered distillery who manufactures for his own use a wooden still shall not be subject to the tax in question but does require the person making such wooden still for his own use to give notice to the collector of the district in which his distillery is located, and of each still manufactured, before the same may be used. All stills, therefore, which are manufactured can be removed only under permit from the collector, which permit must be in pursuance of the notice by the manufacturer and must be registered on Form 26 when set up.

Under provisions of section 3258, R. S., every person having in his possession, custody, or under his control any still or distilling apparatus, set up, is required to register the same with the collector of the district in which such still or distilling apparatus is located. This registry will be made on Form 26,

in triplicate, and delivered to the collector, who will send one copy to the Federal director of prohibition for the State and one to the Commissioner of Internal Revenue. Such registry must be made immediately after the still or distilling apparatus comes into the possession, custody, or under the control of such person, whether it be a new still or distilling apparatus, or whether one party succeeds another in the possession, custody, control, or use of such still or distilling apparatus. See Regulations No. 7, revised July, 1914, pages 5 and 6, relative to registry. The law requires all stills set up to be registered, whether intended for use or not, and this applies to all stills of whatever size and for whatever purpose intended, whether for the distillation of spirits or for pharmaceutical or other purposes; and any still or distilling apparatus which is not so registered is subject to forfeiture to the United States, together with all personal property in the possession or custody or under the control of such person and found in the building or in any yard or inclosure connected with the building in which the same may be set up; and the person whose duty it is to register any still or distilling apparatus, failing to do so, is subject to a pecuniary penalty and to fine and imprisonment under section 3258, Revised Statutes. This applies to all stills of whatever size or capacity, and it will be assumed that any still is intended for the production of distilled spirits, with the exception of retorts for the production of wood alcohol, unless the manufacturer shall furnish to the collector of the district evidence under oath to show that the still is to be used for other purposes than distilling spirits. This evidence must show affirmatively the exact purpose for which the still is to be used and where it is to be

set up and used. Upon filing of the evidence in question along with the notice to the collector of intention to remove the still from the place of manufacture the still may be removed without payment of tax thereon and without permit called for in section 3265, R. S. The same must be registered, however, when set up. These sections of law and this ruling will not apply, however, to glass laboratory stills of trifling capacity used only for chemical purposes. In this connection attention is called to various laws, regulations, and decisions on the subject, as follows:

Regulations No. 7, pages 4, 5, and 6; Regulations No. 1, pages 39 and 40; Treasury Decisions 1344 and 1817; Internal-Revenue Record of September 15, 1890, page 285; sections 3244, 3258, and 3265, R. S.

Special attention is also invited to paragraph 12 of section 1001 of the revenue act of 1918. This law provides that every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this act, $1,000.

PAUL F. MYERS,
Acting Commissioner of Internal Revenue.

Approved March 22, 1920.

D. F. HOUSTON,
Secretary of the Treasury.

(T. D. 3068.)

STILLS AND WORMS—INSTRUCTIONS RELATIVE TO THE MANUFACTURE, SALE, AND REMOVAL OF STILLS AND WORMS, AND REGISTRY OF STILLS.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Federal Prohibition Directors, and Others Concerned:

Special attention is invited to section 18, Title II, of the national prohibition act, which reads as follows: "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor"; section 1, paragraph 7, of Title II of the national prohibition act, which reads, in part, as follows: "The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this act, and the commissioner is authorized to make such regulations"; and to section 3447, Revised Statutes, which provides that: "Whenever the mode or time of assessing or collecting any tax which is imposed is not provided for, the Commissioner of Internal Revenue may establish the same by regulation. He may also make all such regulations, not otherwise provided for, as

may have become necessary by reason of any alteration of law in relation to internal revenue."

In order that the Government may collect from the manufacturers of stills, etc., the taxes legally due from them, and that the national prohibition act may be effectually enforced, T. D. 2993, of March 22, 1920, in regard to the manufacture of stills and worms and the removal and registration of stills, is hereby extended and amplified as follows:

Any still, worm, or condenser of whatever size or capacity, with the exception only of retorts for the production of wood alcohol, and glass laboratory stills of trivial capacity, sold to a user by the manufacturer, will be presumed to be intended for use in the production of distilled spirits, and special tax as manufacturer of stills and tax on the still, worm, or condenser incurred, unless such presumption shall be removed by filing with the collector of internal revenue of the district a sworn statement in triplicate by the purchaser of the still, worm, or condenser, showing that the same will not be used for the production of distilled spirits. When the purchase is by a mail-order house, jobber, or dealer, the same presumption will prevail unless the vendee furnishes the manufacturer with a sworn statement to the effect that sales will be made only for purpose other than producing spirits and before removal of a still, worm, or condenser from the vendor's premises a sworn statement will be obtained from the user as herein provided.

In case of successive sales between dealers, the vendor shall, in each case, take an affidavit of similar purport from the vendee.

When a sale is made by a manufacturer or by a dealer to a person who intends to use the article other-

wise than for distilling spirits, a sworn statement of the purchaser must be executed in triplicate, and must show the purchaser's name and address, the purpose for which the article will be used, that it will not be used for the production of spirits, the address where the still will be registered or other apparatus used, the manufacturer's serial number of the article, and the manufacturer's name and address.

No still, boiler, worm, or other distilling apparatus shall be removed from the premises of the manufacturer or dealer, as the case may be, for delivery to a user, until the collector of the district in which the vendor is located has received from the vendor a notice in writing of his desire to remove the still and permission in writing has been received from the collector to remove the same. In case the still is to be used for purposes other than the distillation of spirits two copies of the required affidavit must accompany the notice filed with the collector. If the article is to be used in another collection district the collector should send one copy of the affidavit to the collector of such district. One copy of the affidavit in question will be filed by the manufacturer or vendor with the permit to remove the still, worm, boiler, etc., in his place of business and will be carefully preserved thereat, and be subject to examination by internal revenue and prohibition officers at all reasonable hours.

Each collector who issues such a permit will notify the interested supervising Federal prohibition agent thereof, furnishing a description and serial number of the article covered by the permit, the name of the purchaser, the purpose for which and the address where the article will be used, or, in the case of a still, the address where it will be set up and registered.

Each still, worm, etc., must have a name plate securely attached thereto by riveting or brazing showing, or have cut by metal stencil legibly and durably in the material of which it is made, the following data:

1. Name of manufacturer.
2. Address of manufacturer.
3. Manufacturer's serial number for the article.

Such marking of stills, worms, etc., must be by the manufacturer, and this information will be disclosed by the manufacturer or vendor in the notice to the collector and in the affidavits required hereby.

Each still, when set up, must be registered in triplicate on Form 26, all copies of which will be forwarded to the collector of internal revenue of the district in which the still is set up, who will send one copy to the supervising Federal prohibition agent of the district in which the still is set up and one copy to the Federal prohibition commissioner. The registry on Form 26 must show the name of the person, firm, or corporation that possesses and has set up the still, the exact location where the same is set up, the manufacturer's serial number of the still shown on the name plate or cut by stencil thereon as herein provided, the kind or character of still, and its capacity. In stating the kind of a still the following information must be furnished: Material of which made, the type of still, whether pot, continuous, column, chambered, etc., and if a chambered still the number of chambers, and if several columns are connected by pipes for production of spirits by continuous process, such fact must be stated in the registry on Form 26. The capacity in wine gallons will be indicated in the case of pot stills and kettles used in connection with columns, and the spirit

production capacity in proof gallons per 24 hours in the case of continuous stills. The diameter of all columns, continuous or discontinuous, must be stated.

A still will be regarded as set up and subject to registry when the same is in such condition that spirits may be produced therewith. Where the still is in position over a furnace, or is connected with a boiler so that heat may be applied, the still will be regarded as set up, although the worm or worm tank is not in position. These instructions will apply to all stills of vacuum type, stills or apparatus in a horizontal position capable of separating alcoholic vapors from liquor alcoholic mixtures or solutions, or any other apparatus designed, intended, actually used, or capable of use for the production of distilled spirits.

Field officers in reporting illicit stills in operation must in all cases, if possible, ascertain the name and address of the manufacturer of the still, worm, etc., and whether or not the taxes due the Government have been paid. If the officer, upon investigation, shall ascertain that there has not been compliance with sections 3244, 3265, Revised Statutes, taxes and penalties should be asserted against the manufacturer. Every effort must be made in such cases by the officers to obtain convincing and complete evidence upon which prosecution may be instituted. There should be cordial cooperation between the internal-revenue officers and Federal prohibition officers.

Manufacturers and vendors commonly represent that the still or worm is sold by them in good faith for distilling water, or other legitimate uses, other than production of distilled spirits, and seek to relieve themselves of responsibility by such pleas. They will evidence their good faith and protect them-

selves in a considerable measure by requiring the affidavits of purchasers called for herein and by cooperating with the Government in every reasonable way to stamp out the distilling of spirits, in the home and elsewhere, in evasion of taxes and in violation of the national prohibition act.

The good will and cooperation of manufacturers and dealers in stills and worms is invited and is confidently expected.

PAUL F. MYERS,
Acting Commissioner of Internal Revenue.

Approved September 4, 1920.

D. F. HOUSTON,
Secretary of the Treasury.

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FILE
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No. 403.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA

v.

GEORGE REMUS *et al.*

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF IN BEHALF OF THE DEFENDANTS-IN-ERROR.

ELIJAH N. ZOLINE,
Counsel for Defendants-in-Error.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

AGAINST

GEORGE REMUS, *et al.*,
Defendants-in-Error.

No. 408.

BRIEF IN BEHALF OF THE DEFENDANTS-IN-ERROR.

Statement.

This is an appeal by the Government from the order of the United States District Court for the Southern District of Ohio, Western Division, sustaining the several demurrers of the defendants to Counts 2, 3, 4, 5, 6 and 7.

Count 2 charges the defendants with having carried on a business of a wholesale liquor dealer from July 1, 1920, to July 30, 1921, without having paid the special tax therefor, as required by law.

Count 3 is in form and tenor substantially the same, except that it relates to a period of time from July 1, 1921, to April 1, 1921.

Counts 4 and 5 charge the defendants with having carried on the business of a retail liquor dealer from June 30, 1921, to April 1, 1922, without having paid the special tax therefor, as required by law.

The sixth and seventh counts charge the defendants with having carried on the business of a rectifier from July 1, 1920, to April 1, 1922, without having paid the special tax therefor, as required by law.

The demurrers of each of the defendants interposed specifically to each of said counts aver:

(*a*) That each of said counts is vague, indefinite and insufficient and does not state any fact or facts sufficient to advise the defendants of the nature of the accusation against them, as is required by the Sixth Amendment of the Constitution of the United States.

(*b*) That at the time of the alleged offenses, there was no law of the United States in force, providing for the licensing of the particular occupation referred to in the respective counts and for the payment of a special tax therefor.

(*c*) That said counts do not charge a violation of any law of the United States (Rec. pp. 6 and

7). (The demurrers of the several defendants are identical.)

The Court upheld the contentions of the defendants as set forth in the respective demurrers. Speaking of the indictment, the Court said:

> "The present language contains no specific charge of manufacture or sale and is too general to be given effect as such" (Rec. p. 23).

We shall refer to the opinion of the Court in another part of the brief.

Motion to Dismiss.

The several counts of the indictments having been found faulty in this that they failed to state facts to apprise the defendants of the nature of the accusation against them, these counts were bad in law. Accordingly, it was sufficient to predicate the judgment upon that alone and did not require the Court to construe the several statutes, although the Court did so.

The Government Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246), Subdivision 1, authorizes an appeal "from a decision or judgment quashing, setting aside or sustaining a demurrer to, any indictment or any count thereof, *where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.*"

As the order in this case was in part founded upon the fact that the indictment did not state facts apprising the defendants of the nature of the accusation against them, and as that is sufficient to sustain the decision of the Court, it follows that the appeal in this case should be dismissed.

United States v. *Carter,* 231 U. S. 492.

On the Merits.

The learned Judge below held that persons dealing in intoxicating liquors illegally, *i. e.,* for beverage purposes, may be prosecuted only under the National Prohibition Act and that Section 3142 of the Revenue Statutes applies only to dealers who deal in intoxicating liquors for non-beverage purposes. He rendered the following brief opinion, stating concisely his reasons for sustaining the demurrers to the counts in question here:

> "Peck, District Judge.
>
> "On motion to quash and demurrer.
>
> "The first count of the indictment charges a conspiracy by the defendants to violate the national prohibition act in specified ways, with averments of overt acts of transportation, possession, and sale of whiskey for beverage purposes. The motion to quash and demurrer to this count have heretofore been overruled.

"The other six counts proceed under section 3242, Revised Statutes, and charge the carrying on of the business of a wholesale and of a retail liquor dealer and of a rectifier, during two several years, without payment of the special tax provided for in section 3244, R. S. U. S. The motion to quash and demurrer raise the vexed question of the extent, if any, to which these statutes have been repealed or modified by the national prohibition act.

"Under section 3242 such dealings without the payment of the tax are punishable by fine of from one to five thousand dollars and imprisonment from six months to two years. The tax is payable annually July first, *in advance.* Under the national prohibition law and section 5 of the supplemental act of November 23, 1921, ch. 134, p. 223, such dealers are still subject to the tax, *and as to permittees manufacturing or dealing in liquor for nonbeverage purposes it is thought that the penalties prescribed by section 3242 aforesaid, for failure to pay the annual taxes, may still be in force.* But as to those who deal for beverage purposes, *that is to say, illegally,* it is provided by section 35 of the national prohibition act that no taxes shall be *received in advance,* but that upon evidence of such illegal manufacture or sale a tax shall be assessed against and collected from the person responsible in double the amount provided by law at the time the national pro-

hibition act took effect, with an additional penalty of five hundred dollars on retail dealers, and one thousand dollars on manufacturers. This provision was held by the Supreme Court in *United States* v. *Yuginovich* (June 1, 1921), to repeal section 3257 R. S., in the case of one who makes liquor for beverage purposes without paying the tax. See also *Lewis* v. *United States, C. C. A. 6, decided April 14, 1922; Ketchum* v. *United States,* 270 Fed. 416. Section 3257 denounces the nonpayment of the tax with intent to defraud by a distiller, and is in *pari materia* with section 3242. There is no doubt that the effect of section 35 of the national prohibition act is the same upon each. The result is that while a permittee who deals in liquor for nonbeverage purposes without paying the annual tax may be subject to the penalties prescribed in section 3242, *one who deals in liquor for beverage purposes is liable to the various penalties prescribed by the national prohibition act but not to those of section 3242.* Gray *v.* United States, 276 Fed. 395 (C. C. A. 6).

"Section 3242, having thus been repealed as to dealers in liquor for beverage purposes, can only *operate upon a restricted class, viz. dealers in nonbeverage liquors.* The statute at best can now be read only to enact that every person *who carries on the business of a liquor dealer for nonbeverage purpose* (or, except for beverage purposes) without hav-

ing paid the special tax as required by law, shall, for every such offense, be fined and imprisoned. Even if the restriction of the class so punishable be stated by way of exception, as in the alternative form above, nevertheless it is such an exception as goes to the very definition of the offense (1 Wharton, Crim. Ev. sec. 288, *et seq.*). Therefore, in order to prosecute under section 3242 for failure to pay the tax, it is necessary to bring the defendant within the now limited scope of the act by averring that he dealt in liquor for non-beverage purposes.

"*The Government urges that the counts under consideration are sufficient to charge sale and manufacture contrary to the national prohibition act.* They aver merely that defendants did carry on the business of a wholesale liquor dealer (retail liquor dealer, rectifier) during certain periods, without having paid the tax. In Farley *v.* United States, 269 Fed. 721, relied on by the Government, the Court found in a similarly intended count sufficient language to charge a sale; but such is not the case here. *The present language contains no specific charge of manufacture or sale, and is too general to be given effect as such.*

"The sixth and seventh counts, charging carrying on the business of a rectifier without having paid the special tax, should be especially mentioned. Rectification is nothing more than part of the process of manu-

facture, and is thus within the inhibition of the present law and the terms of section 35 aforesaid. These counts, therefore, are in no different situation than the others.

"It is concluded that these counts are bad because there is no averment that the business carried on was in liquor for non-beverage purposes, to which business alone the penalties for failure to pay the tax prescribed by the old revenue laws apply. Of course, no such averment could have been made if it was intended to charge as substantive offenses by the last six counts the overt acts of the first, because those acts are laid as dealings in liquor for beverage purposes. Consequently the demurrer to these six counts must be sustained." (Italics ours.)

BRIEF OF THE ARGUMENT.

POINT I.

Counts 2 and 3 charging the defendants-in-error with carrying on the business of a wholesale liquor dealer subsequent to the passage of the National Prohibition Act cannot be sustained under Section 3242 of the Revised Statutes of the United States.

These two counts charge the defendants-in-error with having carried on a business of a wholesale liquor dealer from July 1, 1920, to July 30, 1921, without having paid the special tax therefor, as required by law.

The Court below treated the allegations of the indictment as charging wholesale dealing in intoxicating liquors for beverage purposes, and this Court is bound by the interpretation of the indictment as made by the District Judge.

As was said by this Court in *United States* v. *Yuginovich,* 256 U. S. 450, 461:

> "For the purpose of interpreting the statute, we adopt the meaning placed upon the indictment by the court below. * * * As that court evidently construed the statutes upon the assumption that the charges had relation to intoxicating liquors intended for beverage purposes, we shall follow that view of the indictment in determining whether the former statutes are still in force."

The Court below correctly held that Section 3242 of the Revised Statutes relating to payment of a tax for the privilege of dealing as a wholesale liquor dealer applies only to dealers who carry on a business of a wholesale liquor dealer for non-beverage purposes and not to those who deal illegally for beverage purposes. As dealing in wholesale in intoxicating liquors for beverage purposes is prohibited by law, the defendants-in-error could not have secured such a license and no one in the Treasury Department would or could have accepted a tax for such a purpose.

That the interpretation placed upon the statute by the learned District Judge in the Court below is correct may be seen from the regulations promulgated by the Treasury Department, Bureau of Internal Revenue, No. 60, Edition of February 1, 1920. This regulation deals with wholesale dealers in intoxicating liquors subsequent to the passage of the National Prohibition Act, and authorizes permits to deal in such liquor for non-beverage purposes only.

Section 58 of Article IX, Regulation 60, provides:

> "Any person who desires to obtain permit to sell intoxicating liquor in quantities of 5 wine gallons or more at the same time *for the non-beverage purposes authorized should file application on Form 1404, as prescriped in Article III.* In filing application for per-

mit such person should specifically set forth the kind and maximum quantity of liquor to be held at any one time, or, in case a person is lawfully in the possession of intoxicating liquor and desires to obtain a permit to sell same, he should state in his application the amount and kind of liquor so possessed.

"In all cases it must be stated that such liquor will be sold by him only in wholesale quantities. *Permits will not be issued to deal in intoxicating liquor produced under authority of Article VI for conversion into nonalcoholic beverages.*

"(*a*) Permits to sell intoxicating liquor in quantities of less than 5 wine gallons may be obtained only by retail druggists or pharmacists, as outlined in Article XII, provided, however, that when a person is engaged in business as both a wholesale and retail druggist, he may obtain permit to sell intoxicating liquor in both wholesale and retail quantities. *All sales in retail quantities must be made through a pharmacist.*

"(*b*) Persons obtaining permits to deal in intoxicating liquor in wholesale quantities may procure such liquors from other persons authorized to sell the same upon furnishing permits to purchase on Form 1410.

"(*c*) Intoxicating liquor so procured by such persons may only be sold or furnished by them in wholesale quantities to other persons entitled to procure same unless other-

wise provided by the terms of the permit. Such dealers may furnish or deliver intoxicating liquor only upon receipt of permits to purchase, except in the case of sacramental wines where applications on Form 1412 are received, as hereinabove provided.

"(*d*) Bottled-in-bond whisky and brandy *for domestic medicinal purposes,* procured or possessed by wholesale druggists or other wholesale dealers may be sold by them only in wholesale quantities to other wholesale dealers or to retail druggists or pharmacists, hospitals, sanitariums, manufacturing, and industrial establishments, and physicians *who hold permits to use such liquor for medicinal purposes.*"

In the light of the National Prohibition Act and the regulations promulgated under it the Court below held:

"Under the national prohibition law and section 5 of the supplemental act of November 23, 1921, ch. 134, p. 223, such dealers are still subject to the tax, *and as to permittees manufacturing or dealing in liquor for nonbeverage purposes it is thought that the penalties prescribed by section 3242 aforesaid, for failure to pay the annual taxes, may still be in force. But as to those who deal for beverage purposes, that is to say, illegally,* it is provided by section 35 of the national prohibition act that no taxes shall be *received in advance,* but that upon evidence

of such illegal manufacture or sale a tax shall be assessed against and collected from the person responsible in double the amount provided by law at the time the national prohibition act took effect, with an additional penalty of five hundred dollars on retail dealers, and one thousand dollars on manufacturers. This provision was held by the Supreme Court in United States v. Yuginovitch, June 1, 1921, to repeal section 3257 R. S., in the case of one who makes liquor for beverage purposes without paying the tax. See also Lewis v. United States, C. C. A. 6, decided April 14, 1922; Ketchum v. United States, 270 Fed. 416. Section 3257 denounces the nonpayment of the tax with intent to defraud by a distiller, and is in *parti materia* with section 3242. There is no doubt that the effect of section 35 of the national prohibition act is the same upon each. The result is that while a *permittee* who deals in liquor for nonbeverage purposes without paying the annual tax may be subject to the penalties prescribed in section 3242, one who deals in liquor *for beverage purpose* is liable to the various penalties prescribed by the national prohibition act but not to those of section 3242. Gray v. United States, 276 Fed. 395 (C. C. A. 6).

"Section 3242, having thus been repealed as to dealers in liquor for beverage purposes, can only *operate upon a restricted class, viz., dealers in nonbeverage liquors.* The statute at best can now be read only to enact that

every person who carries on the business of a liquor dealer for nonbeverage purpose (or, except for beverage purposes) without having paid the special tax as required by law, shall, for every such offense, be fined and imprisoned. Even if the restriction of the class so punishable be stated by way of exception, as in the alternative form above, nevertheless it is such an exception as goes to the very definition of the offense. (1 Wharton, Crim. Ev., sec. 288, *et seq.*) Therefore, in order to prosecute under section 3242 for failure to pay the tax, it is necessary to bring the defendant within the now limited scope of the act by averring that he dealt in liquor for nonbeverage purposes."

The Court also held that the counts in question here are insufficient to charge a violation of the National Prohibition Act.

Said the Court:

"The Government urges that the counts under consideration are sufficient to charge sale and manufacture contrary to the national prohibition act. They aver merely that defendants did carry on the business of a wholesale liquor dealer (retail liquor dealer, rectifier) during certain periods, without having paid the tax. In Farley *v.* United States, 269 Fed. 721, relied on by the Government, the court found in a similarly intended count sufficient language to charge

a sale; but such is not the case here. *The present language contains no specific charge of manufacture or sale, and is too general to be given effect as such.*"

POINT II.

Counts 4 and 5 charging the defendants with having carried on the business of a retail liquor dealer from June 30, 1921, to April 1, 1922, without having paid the special tax therefor cannot be sustained under Section 3242 of the Revised Statutes of the United States.

The Court below interpreted the indictment to mean as charging the defendants with having during the period mentioned sold intoxicating liquors for beverage purposes.

Manifestly, since the passage of the National Prohibition Act, no license could have been procured by the defendants-in-error for the conduct of a retail liquor business.

As was said by the United States Circuit Court of Appeals for the Eighth Circuit in *Ketchum* v. *United States*, 270 Fed. 416, 419:

> "In regard to the seventh count, there was no law at the date of the alleged offense that required defendants to pay a special tax on the business of a retail liquor dealer, but that was what they were convicted and punished for. They could not have paid any special tax to any one, and it would have been

no protection to them if they had. It thus appears plainly that the defendants were convicted and punished for omitting to do things that no law required them to do."

And the Court at page 418 further said:

"As the Eighteenth Amendment and the Act absolutely prohibited the manufacture and sale of spirituous liquors, except for certain purposes mentioned in the Act, the procedure for which is provided for therein, there could have been in force at the date charged no law which would have permitted the defendants to be in possession of a distillery such as is described in the record in this case, whether registered or not. The defendants could have in no way obtained a register of their distillery for the purpose for which they were using it. They could not have carried on the business of a distiller of spirituous liquors, even if they had given a bond, and there was no way by which they could give such bond. The laws in force absolutely prohibited such business, bond or no bond. They could not have carried on the business of a distiller in spirituous liquors with intent to defraud the United States of the tax on the spirits distilled by them, for the reason that at the time the offense charged was committed it would have been impossible for the defendants to pay any tax, or to receive any protection even if it had been paid. There was no tax to be paid. To absolutely pro-

hibit the manufacture and sale of spirituous liquors, and then to send persons engaged in such business to the penitentiary because they had not paid a tax on the spirits distilled, involves such a contradiction of purpose that there would seem to be no escape from the conclusion that the law requiring the payment of a tax is inconsistent beyond all reasonable doubt with the Act."

POINT III.

Counts 6 and 7 charging the defendants-in-error with having carried on the business of a rectifier from July 1, 1920, to April 1, 1922, without having paid the special tax therefor cannot be sustained under Section 3242 of the Revised Statutes of the United States.

With relation to these counts, the Court below said:

"The sixth and seventh counts, charging carrying on the business of a rectifier without having paid the special tax, should be especially mentioned. Rectification is nothing more than part of the process of manufacture, and is thus within the inhibition of the present law and the terms of section 35 aforesaid. These counts, therefore, are in no different situation than the others.

"It is concluded that these counts are bad because there is no averment that the business carried on was in liquor for nonbeverage purposes, to which business alone the penalties for failure to pay the tax pre-

> scribed by the old revenue laws apply. Of course, no such averment could have been made if it was intended to charge as substantive offenses by the last six counts the overt acts of the first, because those acts are laid as dealings in liquor for beverage purposes. Consequently, the demurrer to these six counts must be sustained."

We rest upon the reasoning expressed by the Court below as to these counts. Counsel for the Government at page 13 of their brief criticise the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Rossman* v. *United States,* 280 Fed. 950, but in that case *the Government conceded* that Sections 3242 and 3265 of the Revised Statutes *were repealed* by implication by the National Prohibition Act. At page 951 of the opinion in the *Rossman* case, we find the following:

> "(1) It is conceded by counsel for the government, and properly so, that sections 3242 and 3265 of the Revised Statutes are repealed by implication by the National Prohibition Act. United States *v.* Yuginovich, 257 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. , decided by the Supreme Court, June 1, 1921; Gray *v.* United States (C. C. A.), 276 Fed. 395."

Counsel for the Government have now undergone a change of heart and are attacking that which they heretofore conceded.

POINT IV.

The application of the case of United States v. Yuginovich to the case at bar.

The grievance of the Government lies in the fact that the National Prohibition Act, in inflicting punishment for its violation, is less severe than the old Internal Revenue Statutes, but the decision of this Court in the *Yuginovich* case, *supra,* is to the effect that where there are two statutes affecting the same subject matter, the later statute prescribing lesser penalties will repeal the earlier statute on the same subject.

It is true that Section 3242 of the Revised Statutes was not directly passed upon in the *Yuginovich* case, but as this section was passed by Congress along with a series of other statutes for the purpose of raising revenue for the United States out of the liquor industry, it should be treated in the same manner as those sections which were held to be repealed by implication by the National Prohibition Act. Section 3242 cannot be held to apply to conditions subsequent to the adoption of the Eighteenth Amendment and of the National Prohibition Act, when the whole scheme of the Government as to raising revenue from the liquor traffic has been deliberately changed.

The decision in the *Yuginovich* case must therefore, be construed in a broad sense and not restricted to the particular sections of the Revised Statutes passed upon in that decision.

Conclusion.

For the reasons stated, we respectfully ask that the order of the Court below, sustaining the demurrers to the counts in controversy herein, be affirmed.

Respectfully submitted,

ELIJAH N. ZOLINE,
Attorney for Defendants-in-Error.